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3 UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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JAYNES CORPORATION,

Case No. 2:10-cv-00764-MMD-GWF

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Plaintiff,

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AMERICAN SAFETY INDEMNITY
COMPANY, et al.,

BENCH ORDER

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Defendants.

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I. INTRODUCTION

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Trial in this case was limited to the issue of damages on Plaintiff Jaynes Corporation's ("Jaynes") claim for breach of contract on defendant American Safety Indemnity Company's ("ASIC") failure to provide a defense of Jaynes in the underlying action, *Sun City Anthem Community Association v. Del Webb Communities, et. al.*, Clark County District Court Case No. A-10-608708-D ("Sun City Action" or "Underlying Action"). (Dkt. no. 57.) The Court granted the parties' stipulation to withdrawal of ASIC's jury demand (dkt. no. 115), and held a one-day bench trial on April 1, 2014 (dkt. no. 131).

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II. FINDINGS OF FACT¹

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The Court finds that Jaynes incurred fees defending itself in the *Sun City Action* and that those are the fees Jaynes seeks in the instant case. ASIC had a duty to defend Jaynes in the *Sun City Action* and is therefore obligated to pay the reasonable and necessary expenses Jaynes incurred.

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¹Defendant asks the Court to make extensive findings of fact in its Order. The Court, however, resolved all issues at the summary judgment stage except for the narrow issue of damages. As a result, the Court need only address that question in this Order.

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1 **III. CONCLUSIONS OF LAW**

2 When the insurer has breached its duty to defend, the insured carries the burden
 3 of proof regarding the existence and the amount of the expense. Once that burden is
 4 met, the expenses are presumed to be reasonable and necessary and it is the insurer
 5 that then carries the burden of proof to demonstrate that they are actually unreasonable
 6 and unnecessary. See *Aerojet-General Corp. v. Transp. Indem. Co.*, 17 Cal. 4th 38, 64
 7 (1997); *State of Cal. v. Pacific Indem. Co.*, 63 Cal. App. 4th 1535, 1549 (1998). In *Pacific*
 8 *Indemnity*, the insured met its burden “when it demonstrated the hours worked and
 9 provided testimony that the work was all related to the defense.” 63 Cal. App. 4th at
 10 1549.

11 **A. Jaynes’ Burden**

12 In the Court’s order denying Plaintiff’s motion for summary judgment on damages,
 13 the Court found that while the insured’s expenses are presumed reasonable and
 14 necessary in a case in which the insurer breached its duty to defend, the insured must
 15 still provide sufficient evidence so that the opposing party can rebut the presumption with
 16 evidence or argument. (Dkt. no. 77 at 5.) The Court noted that, generally, the insured is
 17 required to show the rates charged, the hours worked, and what the hours were spent
 18 addressing. See, e.g., *Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1262–63 (9th Cir.
 19 1987).

20 At trial, Plaintiff provided the invoices generated by Morris, Polich & Purdy, LLP
 21 (“MPP”) in its representation of Jaynes in the Underlying Action as Plaintiff’s Exhibit 1.
 22 Additionally, Plaintiff provided as Plaintiff’s Exhibit 2 the payment history for the General
 23 Contractor, dated July 22, 2013, and as Plaintiff’s Exhibit 3 the checks served upon
 24 Nicholas M. Wieczorek, the handling attorney at MPP for the *Sun City* Action, in
 25 compensation for the firm’s work on the *Sun City* Action.

26 Mr. Wieczorek testified to the process by which MPP tracked its time spent on the
 27 *Sun City* Action. Mr. Wieczorek explained that each attorney and paralegal recorded his
 28 or her time in the Elite system that the firm uses, the firm generated a prebill each month

1 that Mr. Wieczorek reviewed for accuracy, and then the firm prepared a final bill that was
 2 then sent to the client. Jaynes paid each final bill in full. Mr. Wieczorek also explained
 3 that he reported to Jaynes throughout the case, including written status updates and
 4 phone calls with Jim Rosel, who was the vice-president and general counsel for Jaynes
 5 during the *Sun City* Action.

6 Plaintiff's Exhibit 1, Mr. Wieczorek testified, includes a copy of every bill
 7 generated in the *Sun City* Action from the beginning of the case to its conclusion. Mr.
 8 Wieczorek testified that the bills total \$178,422.07. This figure, Mr. Wieczorek explained,
 9 does not include a number of costs for bills that Jaynes paid directly. Because those bills
 10 went directly to the client, Mr. Wieczorek did not include those costs in his total.² Mr.
 11 Wieczorek also identified the entries that were related to pursuit, totaling \$8,230, and
 12 subtracted them from the fees total. As a result, Jaynes seeks a total of \$170,192.07 in
 13 fees, from which Jaynes agrees the Court will deduct the self-insured retention ("SIR").

14 ASIC presented a single witness at trial, Jean Fisher, corporate claims counsel at
 15 ASIC during the relevant period of time. Ms. Fisher testified that ASIC's calculation of the
 16 invoices in Exhibit 1 totals \$176,199.07, compared to Mr. Wieczorek's calculation of
 17 \$178,422.07. Ms. Fisher also subtracted the fees related to pursuit totaling \$8,230.³
 18 Thus, ASIC testified that \$167,969.07 is the baseline fee calculation for Jaynes. It is from
 19 this baseline calculation that ASIC argues a number of charges should be subtracted as
 20 unreasonable and unnecessary, discussed in Section III.B. *infra*.

21 After considering the exhibits, and the testimony Plaintiff presented at trial
 22 explaining the calculations, the Court finds that Jaynes' requested fees are reasonable
 23 and necessary. However, the Court's own calculation totaling the invoices from Exhibit 1

24 ²Despite not including these costs in Plaintiff's total requested fees, Plaintiff
 25 included the bills for each of these costs in Plaintiff's Exhibit 1 without marking them as
 26 such. As a result, the Court was required to expend unnecessary judicial resources
 27 wading through Plaintiff's Exhibit 1 in order to verify the parties' calculations.

28 ³Ms. Fisher testified that this calculation of pursuit fees is too low and that
 29 \$28,000 should in fact be deducted. This argument is addressed in Section III.B.ii.b. *infra*
 30 as it concerns ASIC's burden to show that certain fees are in fact unreasonable and
 31 unnecessary.

1 matches neither Plaintiff's nor Defendant's.⁴ The Court's calculation of fees from Exhibit
 2 1, excluding costs, totals \$176,199.92. The Court has identified its discrepancy with
 3 Defendant's calculation. Defendant's Exhibit 512 erroneously listed the total invoice
 4 amount from invoice number 185566 as \$16,139,⁵ instead of the correct amount of
 5 \$16,139.85, resulting in the Court's calculation being \$.85 higher. The Court cannot
 6 provide an explanation for the discrepancy between its number and the number provided
 7 by Plaintiff as Plaintiff failed to provide the Court with a breakdown of its calculations.

8 The Court finds that Jaynes has met its initial burden to demonstrate that it
 9 incurred \$167,969.92 (\$176,199.92 minus \$8,230 in pursuit fees) in reasonable and
 10 necessary attorneys' fees in defending itself in the *Sun City* action.

11 **B. ASIC's Burden**

12 As the Court finds that Jaynes has met its initial burden, ASIC carries the burden
 13 of demonstrating that the fees are actually unreasonable and unnecessary.

14 In attempting to meet its burden, ASIC relied repeatedly throughout trial upon its
 15 own coverage standards to argue that particular charges are unreasonable or
 16 unnecessary. As the Court has previously found, ASIC declined to defend Jaynes in the
 17 *Sun City* Action, thus breaching its duty to defend. (See dkt. no. 57.) It is inappropriate
 18 for ASIC to imply at trial that its own policies determine which costs it should pay Jaynes
 19 for its *Sun City* defense. Instead, in challenging Jaynes' fees, ASIC must demonstrate
 20 that any disputed fees are unreasonable and unnecessary under the case law of this
 21 jurisdiction, not its own policy.

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24 ⁴The parties did not explain to the Court the reason for the discrepancy between
 25 their respective calculations. The parties could have easily resolved their discrepancy
 26 and stipulated to a baseline figure, or at least explained to the Court the source of the
 27 discrepancy, rather than require the Court to go carefully through every invoice to reach
 28 its own total.

27 ⁵ Given that Defendant's Exhibit 512 did not provide the cents for invoice number
 28 185566 and all other figures represented in the Exhibit included cents, even when the
 cents were ".00", the Court assumes that the mistake was merely a typographical error.

1 **1. Reasonable**2 **a. Hourly Rate**

3 MPP calculated its fees based on the rates outlined in the firm's fee agreement
 4 with Jaynes: \$250 per hour for partner, \$200 per hour for associates, and \$100 per hour
 5 for paralegals and law clerks. Jaynes paid all bills in full at the rates outlined in the fee
 6 agreement.⁶ ASIC does not appear to challenge the reasonableness of these rates⁷ and
 7 the Court finds no reason to question them.

8 In order to decide what rate is reasonable, courts look at prevailing market rates
 9 in the relevant community." *J.C. v. Vacaville Unified Sch. Dist.*, 2007 U.S. Dist. LEXIS
 10 2475, at *14 (E.D. Cal. Jan. 10, 2007). "Generally, the relevant community is the forum in
 11 which the district court sits." *Id.* While Plaintiff provided the Court with no evidence that
 12 the requested rates are in line with those prevailing in the community, it is Defendant's
 13 burden to demonstrate that they are unreasonable. The only evidence that Defendant
 14 introduced regarding rates was Ms. Fisher's testimony that the panel counsel rate for
 15 defending an insured in Nevada is \$150 per hour or \$175 per hour. Simply stating that
 16 the negotiated panel rate is somewhat lower is not sufficient evidence for the Court to
 17 find the rates charged by MPP to be unreasonable. In fact, based on the Court's
 18 familiarity with the billing rates in this jurisdiction, the Court finds MPP's rates in this case
 19 to be on the low side and certainly more than reasonable.

20 **b. Fees**

21 Setting aside the question of whether Jaynes should have the opportunity to
 22 recover fees for litigation of its affirmative claims, discussed in Section III.B.1 *infra*, ASIC
 23 objects to the reasonableness of four categories of fees charged by Jaynes: (1) fees that
 24 appear to be duplicates; (2) fees charged for work following a settlement offer; (3) fees
 25

26 ⁶At trial, ASIC attempted to improperly re-argue the Court's previous finding that
 27 Jaynes paid for the defense cost of the Underlying Action. (See Order, dkt. no. 57, 4-6.)

28 ⁷It is not clear to the Court that Ms. Fisher's testimony regarding panel counsel
 rates in Nevada is a challenge to the reasonableness of MPP's charged rates.

1 that appear secretarial in nature; and (4) fees that appear to be "excessive." The Court
2 will address each category of disputed fees in turn.

i. Duplicates

4 During the trial, Ms. Fisher pointed out a number of fees in Plaintiff's Exhibit 1 that
5 she identified as being duplicative. Ms. Fisher listed each allegedly duplicative charge in
6 Defendant's Exhibit 514, totaling \$4,420, which ASIC asks this Court to subtract from
7 Jaynes' total fee award.

8 Ms. Fisher testified that invoice number 177212, for example, includes a number
9 of entries that appear to be duplicative. (See Plf.'s Ex. 1, Bates Nos. 2110-2121.) On
10 June 1, 2011, MPP charged .20 hours for "Review of notices regarding witness
11 depositions" for a total fee of \$50. Directly under this entry is an entry on the same day,
12 with the same description, charging for the same amount of time.

13 The Court finds that ASIC has not met its burden to demonstrate that these fee
14 entries are in fact duplicative. Jaynes, as the Court discussed in Section III.A. *supra*, has
15 met its burden in establishing the reasonableness of its requested fees. It is, therefore,
16 ASIC's burden to demonstrate that certain fees are in fact unreasonable. Ms. Fisher has
17 no insight into the work charged for these respective fees beyond reading the entries
18 themselves. While the Court notes that Ms. Fisher's observations are certainly correct,
19 that there are a number of identical entries in Plaintiff's Exhibit 1, there are many
20 plausible explanations for why there are repeat entries.⁸ ASIC had the opportunity to
21 cross-examine Mr. Weiczorek, who does have personal knowledge of the work
22 performed, but failed to ask Mr. Weiczorek a single question about the purported
23 duplicative fees. As a result, the Court finds that ASIC did not meet its burden to
24 establish that these fees were in fact duplicative and unreasonable.

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ii. Post-Settlement Fees

2 Second, ASIC argues that it was unreasonable for Jaynes to charge any
3 attorneys' fees after the mediator contacted Mr. Wieczorek on June 6, 2012, to inform
4 him that the case had reached a global settlement for two million dollars. Ms. Fisher
5 stated that she does not believe the duty to defend includes shepherding the case
6 through dismissal. As a result, Ms. Fisher recommended striking every charge following
7 the June 6 conversation. When asked what happens if a settlement falls apart, Ms.
8 Fisher stated that the duty to defend would resume. Despite her position that post-
9 settlement costs do not fall within the duty to defend, Ms. Fisher may in practice pay
10 post-settlement costs.

11 The Court does not find that ASIC has met its burden to demonstrate that the
12 post-settlement fees are unreasonable. Creating an arbitrary cut-off at the time a
13 settlement is announced would mean that the duty to defend includes the negotiation of
14 a settlement but not finalizing the settlement and ensuring that defense of Plaintiff
15 actually reached the final conclusion of the lawsuit (i.e., dismissal). Such a cut-off is one
16 of many examples of Defendant advocating for formalism without regard to the purpose
17 behind the litigation. If a party's goal in defending itself is to resolve a case, it is
18 necessary to not simply accept a settlement offer but to finalize a settlement agreement
19 and obtain dismissal

iii. Secretarial

21 Third, Ms. Fisher testified that she believes Jaynes has requested \$2,200 in fees
22 that are “secretarial” in nature and thus should be subtracted from Plaintiff’s total fee
23 award. The relevant charges are listed in ASIC’s Exhibit 514. ASIC provided no basis for
24 its argument that these charges are secretarial besides Ms. Fisher’s lay testimony that
25 she considers them to be secretarial. As with the alleged duplicative charges, ASIC
26 could have cross-examined Mr. Weiczorek in order to elicit testimony regarding the tasks
27 performed related to the purported secretarial tasks, but failed to take advantage of that
28 opportunity.

1 The Court has reviewed every entry marked as secretarial and determines that
 2 the descriptions alone are inadequate to find that they were inappropriately marked as
 3 attorneys' fees. Every task but one that Ms. Fisher claimed was secretarial was
 4 performed by paralegal Lisa L. Woodruff. In reviewing each charge by Ms. Woodruff, the
 5 Court finds that they are not facially unreasonable and thus do not defeat the Court's
 6 presumption of reasonableness.

7 Only one charge marked by Ms. Fisher as secretarial was for work performed by
 8 someone other than Ms. Woodruff. This single charge was for work performed by Mr.
 9 Wieczorek and occurred on March 30, 2011. The relevant entry stated "Review of
 10 consultant expert draft report; Arrange for service and deposit of same to depository."
 11 (Plf.'s Ex. 1, Bates No. 2080.) Mr. Wieczorek billed .8 hours for this entry, for a total
 12 charge of \$200. (See *id.*) Given that Ms. Fisher recommends reducing the charge from
 13 \$200 to \$100, the Court presumes that ASIC's objection to this charge relates to the
 14 portion of the work dedicated to arranging service and depositing the draft report into the
 15 repository. (See Def.'s Ex. 514.) While the Court does not find Ms. Fisher's
 16 characterization unreasonable that part of this work may have been for secretarial work,
 17 there is no evidence in the record supporting that inference and ASIC's proposed
 18 reduction by half appears arbitrary. The Court therefore declines to reduce Mr.
 19 Wieczorek's charge.⁹

20 The Court finds that ASIC has not met its burden to demonstrate that the charges
 21 marked by Ms. Fisher as secretarial are unreasonable and thus declines to subtract
 22 these charges from Jaynes' fee total.

23 **iv. Excessive**

24 Finally, Ms. Fisher stated briefly during trial that there are several charges that
 25 appear to her to be "excessive" and that, as identified in Defendant's Exhibit 514, these

26
 27 ⁹In declining to reduce this charge by half, the Court is granting Plaintiff a mere
 28 \$100 more than Defendant proposes. As with many disputes addressed in this Order,
 this is an issue that could easily have been resolved by the parties.

1 charges total \$275.¹⁰ Given that Plaintiff failed to elicit any testimony from Mr. Wieczorek
 2 regarding these charges, or otherwise introduce any evidence regarding these entries,
 3 the Court declines to find that these fees are unreasonable.

4 **2. Necessary**

5 The heart of the dispute between the parties concerns the scope of Jaynes'
 6 defense in the *Sun City* Action and whether ASIC is responsible for Jaynes' affirmative
 7 claims or merely its litigation that was technically labeled as defense.

8 **a. Affirmative claims**

9 ASIC argues that many of Plaintiff's requested fees are not necessary as they
 10 relate to Plaintiff's affirmative crossclaims and third-party claims, rather than exclusively
 11 to its defense. While affirmative claims seeking monetary damages are not covered by
 12 the duty to defend, prosecution costs that are inextricably linked to defense costs are
 13 recoverable as part of the duty to defend. *State of Cal. v. Pacific Indem. Co.*, 63 Cal.
 14 App. 4th 1535, 1549 (1998).

15 At trial, Mr. Wieczorek testified that Jaynes, as the contractor for the common
 16 area improvements at Pinnacle Village, subcontracted out all work, thus performing none
 17 of the work itself. Mr. Wieczorek explained that Jaynes, therefore, expected its
 18 subcontractors to take responsibility for any defects in their work. In order to make it
 19 possible for the subcontractors to take responsibility, Jaynes needed to bring all
 20 subcontractors into the case. Defendant's Exhibit 508 is Jaynes' answer, third-party
 21 complaint, and crossclaims in the *Sun City* Action. A review of the third-party complaint
 22 and crossclaims reveals that each "affirmative claim" was inextricably intertwined with
 23 Jaynes' defense. Given Jaynes' position that to the extent liability was found it was the
 24 subcontractors that were liable, it was necessary for Jaynes to ensure that it litigated
 25 accordingly. Further, the Court finds that Jaynes did not bring claims in order to obtain
 26 affirmative damages, but simply to obtain indemnification.

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¹⁰The Court is unpersuaded by ASIC's argument that nine separate entries,
 totaling a mere \$275, are facially excessive.

1 Ms. Fisher testified that ASIC requires its general contractors to pursue
 2 subcontractors on their own dime, but that such pursuit is not considered by ASIC to be
 3 part of the duty to defend. She recommended that Jaynes' fees be therefore reduced by
 4 \$53,000. In closing, ASIC's counsel argued that if Jaynes were committed to exclusively
 5 defending itself, it should not have brought any affirmative claims in the *Sun City* Action,
 6 and, if they were found liable in that case, subsequently sought indemnity in a separate
 7 action. Were the Court to adopt such a rule, it would be responsible for requiring
 8 inefficiency for the sake of formalistic boundaries. The Court declines to adopt ASIC's
 9 recommended approach and finds that the affirmative steps Jaynes took were necessary
 10 to its defense.

11 **b. Coverage**

12 ASIC additionally seeks to categorize a number of fee entries as "coverage"
 13 entries above and beyond the \$8,230 Jaynes sought in pursuit fees.¹¹ ASIC
 14 recommends reducing Jaynes' requested fees by approximately \$28,000. ASIC did not
 15 offer an adequate explanation for what it claims to be "coverage." However, based on
 16 the Court's review of Defendant's Exhibit 514, ASIC appears to describe services
 17 relating to the pursuit and addition of Jaynes' other subcontractors and their carriers as
 18 "coverage."

19 The Court declines to reduce Jaynes' fee award as requested. As an initial matter,
 20 ASIC failed to clearly provide its definition of "pursuit fees" or "coverage fees" thus the
 21 Court cannot discern from Defendant's Exhibit 514 why ASIC believes so many
 22 additional fees need to be subtracted. Additionally, Ms. Fisher admitted that there may
 23 be duplication between what Ms. Fisher recommended reducing as pursuit fees and
 24 what Jaynes had already deducted, in part because ASIC solicited no evidence
 25 regarding the underlying work performed for individual fee entries beyond what was

26 ¹¹ASIC also asks the Court to adopt Jaynes' insurer's characterization of
 27 coverage fees. The Court declines to consider what Jaynes' carrier may have
 28 characterized since there was no testimony offered as to the basis for such
 characterization.

1 provided in the exhibits. Moreover, the Court finds that Jaynes' fees relating to the
2 pursuit and addition of other subcontractors' carriers was necessary to its defense of the
3 Underlying Action for the same reason that the affirmative claim fees were necessary as
4 discussed above.

5 **C. Total**

6 As the Court found on summary judgment, ASIC must compensate Jaynes for
7 reasonable costs incurred in defense of the *Sun City* Action, except for the amount that
8 Jaynes must pay ASIC pursuant to the SIR. The Court now finds that Plaintiff has
9 established that it incurred \$167,969.92 in reasonable and necessary expenses.
10 Defendant has failed to demonstrate that any of these expenses are unreasonable or
11 unnecessary.

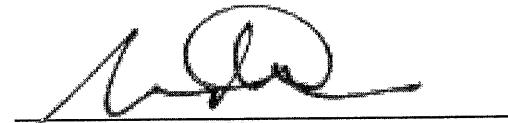
12 Plaintiff has conceded that it is willing to subtract whichever SIR Defendant
13 selects. At trial, ASIC stated for the record that it seeks to apply the \$20,000 SIR. (See
14 Def.'s Exhibit 503, Bates No. ASIC00203.) Accordingly, the Court applies the \$20,000
15 SIR.

16 The Court therefore finds that ASIC owes Jaynes \$147,969.92 in fees incurred in
17 defending itself in the *Sun City* Action.

18 **IV. CONCLUSION**

19 It is hereby ordered that ASIC compensate Jaynes in the amount of \$147,969.92.
20 The Clerk is directed to enter judgment in favor of Jaynes Corporation and against
21 American Safety Indemnity Company in the amount of \$147,969.92.

22 DATED THIS 25th day of April 2014.

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26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE
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